

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KENNETH FLEMING, et al.,

Plaintiffs,

v.

CORPORATION OF THE PRESIDENT OF THE
CHURCH OF JESUS CHRIST OF LATTER-
DAY SAINTS, et al.,

Defendants.

NO. 04-2338 RSM

**DEFENDANTS'
MEMORANDUM IN
OPPOSITION TO PLAINTIFFS'
MOTION TO COMPEL**

**Note on Motion Calendar:
Friday, January 13, 2006**

I. INTRODUCTION

Plaintiffs' motion to compel was initially denied because plaintiffs failed to comply with Fed.R.Civ.P. 37 before filing it. Although the original motion addressed many issues, the current motion is limited to essentially one: can two LDS bishops maintain confidentiality with regard to penitential communications between themselves and Jack LoHolt, a member of the LDS Church.

Plaintiffs assert that the LDS Church has invoked the clergy privilege too broadly, but plaintiffs are asking this Court to read the privilege so narrowly that it would rarely, if ever, apply. Even though an LDS Church bishop has testified that the communications at issue were penitential in nature and intended to be confidential, plaintiffs are seeking the "substance" of the privileged communications. Plaintiffs cite no legal authority that would justify this implied abrogation of the privilege. To the contrary, Washington law regarding the clergy privilege provides broad protection for private communications between clergy and

OPPOSITION TO MOTION TO COMPEL - 1

7566-023128 31A48494

STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

601 Union Street, Suite 3100

Seattle WA 98101.1374

TEL 206.623.9900 FAX 206.624.6885

members of his congregation which clearly protects the communications at issue here. Accordingly, plaintiffs' motion lacks merit and should be denied.

II. STATEMENT OF RELEVANT FACTS

1. Plaintiffs are seeking to compel testimony from two LDS Church Bishops, namely Bishop Randall Borland and Bishop Philip J. Coleman.

2. At the local level, bishops preside over LDS Church congregations. They are the ecclesiastical leaders for these local congregations, which are referred to as wards.¹ Exhibit 2 to the Declaration of Marcus B. Nash.

3. The bishop is the presiding clergyman of his ward and has ecclesiastical authority over its members.² Id. Bishops must be "ordained" by a laying-on-of-hands ceremony by those with priesthood authority before they can serve in their respective callings. Id.

4. Church doctrine, policies and ecclesiastical practice require a bishop to hold all private communications made by members in the strictest confidence. Exhibit 3 to Declaration of Marcus Nash ("Nash Decl."), Church Handbook of Instructions ("Church Handbook") at 22, 93. Maintaining the confidentiality of bishop-member communications is essential to the ability of all bishops to fulfill their ecclesiastical responsibilities. Without the expectation of confidentiality, penitents/parishioners and others would be discouraged from baring their souls and participating in the repentance and redemptive process of the LDS religion for fear of the public dissemination of personal information. In short, Bishops would not be able to provide effective spiritual guidance to members of their ward, an essential aspect of the office of bishop. Exhibit 2 to the Declaration of Marcus B. Nash.

A. **Bishop Coleman Did Not Invoke the Clergy Privilege As Asserted by Plaintiffs.**

¹ A ward consists of approximately 300-600 members living within specific geographical boundaries. Members attend the ward in which they reside. FACTUAL CITATION.
² Bishops are laymen, not professional churchmen: they are doctors, lawyers, businessmen, plumbers, etc. who perform their heavy clerical responsibilities after work hours and on weekends. FACTUAL CITATION.

1 5. Bishop Coleman testified regarding his communication with a member of his
2 congregation about sexual molestation allegations against Jack LoHolt.

3 6. Counsel for the Church initially instructed the bishop not to divulge any
4 confidential communications made to him while acting as clergy:

5 Q: Did you receive any information of any kind from any person that Jack
6 LoHolt was allegedly engaging in sexually inappropriate activity?

7 A: Yes.

8 Q: From who whom did you learn that?

9 MR. FREY: I am going to object at this point in time. Let me tell you
10 the basis for the objection. He was a bishop at the time, and we treat
11 those communications as confidential, and in trying to help you with this
12 answer, I'm not trying to present a roadblock.

13 As an accommodation and because of the fact that the individuals
14 involved have not authorized this information to be given, I think they
15 have a right to privacy in that regard and a right to have it protected.

16 Exhibit 4 to Nash Decl., Dep. of Bishop Coleman ("Coleman Dep.") at 45:18-46:9.

17 7. Bishop Coleman decided during the deposition that the responsive
18 communication with the member of his congregation regarding Jack LoHolt was likely not
19 covered by the clergy privilege:

20 Q: Was the person who communicated this to you a member of the
21 Mormon church?

22 A: Yes.

23 Q: Was this communication made to you in your capacity as bishop?

24 A: I think so.

25 Q: Okay. Did it occur at, for example, the ward building or your office?

26 A: I don't remember that.

27 Q: Okay. Was the person who communicated this to you, in your view,
making a statement of confession or penitential contrition?

 A: No.

 Q: Under the doctrines and tenants of your faith, do you believe that you
are absolutely required to keep what that person said to you
confidential, and I mean that you cannot repeat it to anyone?

 A: No.

 Coleman Dep. at 50:6-23.

1 8. Bishop Coleman revealed the contents of his discussion regarding sexual
2 molestation by Jack LoHolt. Coleman Dep. at 53:5-25.

3 9. However, Counsel for the Church instructed Bishop Coleman not to reveal the
4 names of the victims because he was concerned about the privacy rights of third parties who
5 are not involved in this litigation. Coleman Dep. at 53:5-25.

6 10. As plaintiff has indicated, counsel for the Church is willing to turn over the
7 names of the victims if Plaintiffs are willing to enter into an agreement keeping the identities of
8 the victims confidential. Defendants believe this issue was resolved during the discovery
9 conference, and are surprised to see it surface in the motion to compel. (Declaration of
10 Marcus B. Nash.)

11 11. Bishop Coleman did invoke the clergy privilege in regard to privileged
12 communications with Jack LoHolt. Coleman Dep. at 54:15-56:3. Defendants maintain that
13 these communications are properly covered by the privilege.

14 **B. Bishop Borland Invoked the Clergy Privilege in Regard to Confidential**
15 **Communications Between Him and Members of His Congregation.**

16 12. Bishop Borland did invoke the clergy-communicant privilege as to confidential
17 communications he had with an unidentified member of his congregation or ward, testifying
18 that this was a confidential communication revealed to him during spiritual counseling that he
19 was required to keep confidential under the discipline of his church:

20 Q: So again my question is: Was this something that you learned in
21 connection with pastoral counseling within the Church?

22 A: Yes.

23 Q: Was the information that you received something that you are required
24 to keep confidential under the doctrines and teachings of your church?

25 A: Yes.

26 Q: Was the communication that you received something that you in fact
27 kept confidential, that is, that you did not disclose to any other person?

 A: Let me make sure I understand that. A communication not disclosed to
anybody else?

 Q: Correct.

1 A: The answer to that question, if I've heard the question correct, is yes or
2 -- let me rephrase it, and then tell you what I thought you said.

3 Q: Go ahead.

4 A: I did not disclose what was said confidentially to me to others.

5 Q: Just so that I'm clear on this, you did not disclose the content of what
6 was said to you by that person to any other person?

7 A: The content of that conversation, that meeting, I did not.

8 Exhibit 5 to Nash. Decl., Dep. of Bishop Borland ("Borland Dep.") at 57:2-58:1.

9 13. Since Bishop Borland's deposition was taken, Richard Pettit, the person who
10 spoke with Bishop Borland, has affirmatively waived the privilege and released Bishop
11 Borland to testify about it. Mr. Pettit testified at his deposition about his communications with
12 Bishop Borland. Given the waiver of the privilege by the person who held it, Bishop Borland
13 is now free to testify about his communications with Mr. Pettit.

14 14. Bishop Borland also claimed the clergy privilege in regard to certain
15 confidential communications with Jack LoHolt. Borland Dep. at 71:17-72:7. Bishop Borland
16 likewise testified that these communications were penitential communications that he was
17 required to keep confidential under the teachings of the Church. Borland Dep. at 71:17-72:7.
18 Unlike Mr. Pettit, Jack LoHolt has never waived the privilege or indicated his consent to any
19 bishop revealing the substance of penitential discussions with him.

20 **III. ARGUMENT**

21 **A. Issues That Have Been Resolved.**

22 **1. Bishop Coleman will reveal the names of other victims of LoHolt with a 23 confidentiality agreement.**

24 Bishop Coleman testified regarding the discussion he had with a member of his
25 congregation about sexual molestation allegations made against Jack LoHolt. See
26 Facts at ¶¶ 10-11. Counsel for the Church allowed Bishop Coleman to testify on this
27 point, objecting only to revealing the names of the victims. Bishop Coleman should not
be required to turn over these names without a confidentiality agreement. The victims
are third parties to this litigation, who have certain privacy rights and they have not

1 given Bishop Coleman consent to make public the fact that they are victims of sexual
 2 abuse. See *Breed v. United States Dist. Ct. for Northern District*, 542 F.2d 1114, 1116
 3 (9th Cir. 1976) (balancing the invasion of minor's privacy rights against the court's need
 4 for ward files); *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1497 (10th Cir.
 5 1992), cert. den., 507 U.S. 910, 122 L. Ed. 2d 654, 113 S. Ct. 1255 (1993) (denying
 6 discovery of names of participants in a medical study due to privacy interests of the
 7 individual participants); *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 550-51 (E.D.
 8 Cal. 1990) (balancing targeted individual's right of privacy against public's need for
 9 discovery in employment discrimination case). These privacy rights should be
 10 respected even if no clergy privilege applies.
 11

12 Since the initial motion was filed, counsel for defendants and plaintiffs have agreed to
 13 release the names with a confidentiality agreement. As mentioned above, defendants
 14 believe that the parties have reached a resolution on this issue. (Declaration of Marcus B.
 15 Nash.) Plaintiffs admit as much in their moving papers. Defendants are surprised that has
 16 re-surfaced in plaintiffs' revised motion. To the extent that plaintiffs include this issue in their
 17 motion to compel because they no longer agree to a confidentiality agreement, defendants
 18 object and seek an order from the court that a confidentiality agreement is necessary to
 19 protect the privacy interests of the third parties.
 20
 21

22 **2. Bishop Borland has been released to speak of communications with Mr.**
 23 **Pettit due to Mr. Pettit's waiver of the privilege.**

24 At the time of his deposition, Bishop Borland refused to testify about confidential
 25 communications with an unidentified ward member because he believed a privilege protected
 26 that communication. Since his deposition was taken, Richard Pettit, the unidentified ward
 27

1 member, waived the privilege,³ and testified in this case regarding his communications with
 2 Bishop Borland. Thus, Bishop Borland is free to testify about his communications with Mr.
 3 Pettit. Defendants have no objection to resuming the deposition of Bishop Borland so he
 4 may now testify on that discreet issue, clear of conscience that he might be revealing
 5 privileged matters.

6 In their motion to compel, plaintiffs seek testimony from Bishop Borland on six issues,
 7 including whether he ever received a complaint about Jack LoHolt, what he did in response,
 8 whether he ever investigated a report of child sexual abuse, why Bishop Borland released
 9 LoHolt, conversations with his superior regarding LoHolt, and whether he had concerns
 10 about returning LoHolt to a position involving youth. Motion to Compel at 4-5. Plaintiffs
 11 believe the bishop should have been able to do answer these questions without revealing
 12 privileged information. Bishop Borland did not agree. See Borland Dep. at 73:7-19.
 13 Knowing that the answer to all of these questions would require revealing information
 14 provided him by Mr. Pettit during a privileged communication, Bishop Borland believed that
 15 he could not answer these questions without violating the privilege. See *id.* The bishop
 16 cannot be required to answer questions that would force him to risk inadvertently breaching
 17 the privilege.⁴ Now that Mr. Pettit has released Bishop Borland from the privilege, he can
 18 testify about what Mr. Pettit told him when answering the above questions. However, for
 19 reasons explained herein and at the depositions, he cannot divulge any information or
 20

21 ³ Clergy are entitled to invoke the privilege on the communicant's behalf. See, e.g., *Harris v.*
 22 *Drake*, 65 P.3d 350, 362-63 (Wash. App. 2003) (citing *Martin* for the proposition that clergy
 23 may claim privilege on behalf of communicant); *In re Grand Jury Investigation*, 918 F.2d 374,
 24 379-80 (3d Cir. 1990) (citing Proposed Fed. R. Evid. 506 for proposition that "[t]he clergyman
 may claim the privilege on behalf of the person. His authority is presumed in the absence of
 evidence to the contrary.").

25 ⁴ In addition, the Free Exercise Clause church autonomy doctrine may prohibit discovery
 26 into ecclesiastical decision-making. See, e.g., *Hadnot v. Shaw*, 826 P.2d 978, 989 (Okla.
 27 1992) ("The Free Exercise Clause prohibits civil courts from inquiring into any phase of
 ecclesiastical decisionmaking – its merits as well as procedure."); *Gonzalez v. Roman
 Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Nally v. Grace Community Church of
 the Valley*, 763 P.2d 948 (Cal. 1988), cert. denied 490 U.S. 1007 (1989)

1 thought processes that would reveal anything concerning the content of Mr. LoHolt's
2 communications with him or any Bishop of the church.

3 **B. Issues Still Pending.**

4 Bishop Coleman and Bishop Borland refused to testify regarding communications
5 between themselves and Jack LoHolt on the basis that these communications were
6 confidential and penitential in nature. These communications were clearly privileged despite
7 plaintiffs' assertions to the contrary.

8 Washington law provides broad protection for such confidential communications
9 between clergy and the communicant:

10 A member of the clergy or a priest shall not, without the consent of a person
11 making the confession, be examined as to any confession made to him or her
12 in his or her professional character, in the course of discipline enjoined by the
13 church to which he or she belongs.

14 Wash. Rev. Code § 5.60.060. Washington courts have consistently held that
15 communications between clergy and penitent are privileged when they are: (1) made to an
16 ordained member of the clergy;⁵ (2) a "confession"... "in the course of discipline enjoined by
17 the church"; and (3) confidential. *State v. Martin*, 137 Wn.2d 774, 791, 975 P.2d 1020
18 (1999); *Doe v. Corp. of the President of the Church of Christ of Latter-Day Saints*, 122 Wn.
19 App. 556, 563 (Wash. Ct. App. 2004).

20 **1. The Communications at Issue Clearly Qualify as Confessions Made in
21 the Course of Discipline Enjoined by the LDS Church.**

22 In *State v. Martin*, 137 Wash.2d 774, 975 P.2d 1020 (1999), the Supreme Court of
23 Washington held that "the religious entity, and not the courts, should decide what types of
24 communications constitute confessions within the meaning of a particular religion." *Id.* at
25 787. It is important to note that the term "confession" does not refer solely to the disclosure of
26 sins but also includes "spiritual counseling." *Id.* at 785. The court in *Martin* relied heavily on
27 the Utah Supreme Court's decision in *Scott v. Hammock*, 870 P.2d 947 (Utah 1994); indeed,

⁵ Plaintiffs have not disputed that the bishops were clergy for the LDS Church at all relevant times. Accordingly, it is not necessary to address this issue as the bishops clearly were ordained clergy at the time of their communications with the communicants.

1 *Martin* cites *Scott* on how to define "confession." 137 Wn.2d at 787 n. 73. The *Scott* court
 2 determined that the term confession includes not only formal, penitential communications
 3 such as occur in the Catholic Sacrament of Penance, but also a disclosure or
 4 acknowledgment of something personal (see 870 P.2d at 951) or the "providing [of]
 5 confidential counsel and advice to . . . communicants in helping them to abandon wrongful or
 6 harmful conduct, adopt higher standards of conduct, and reconcile themselves with others
 7 and God." *Id.* at 952.

8 Bishop Borland unequivocally testified that the communications plaintiffs seek to
 9 discover involved the disclosure of deeply personal matters, that these communications were
 10 part of spiritual counseling and that he is required to keep these communications confidential
 11 under Church policy. See Facts at ¶¶ 15-16.⁶ Bishop Coleman similarly testified that his
 12 communications with Jack LoHolt were in his role as bishop and concerned the issue of
 13 transgressions against Church law. Facts at ¶ 14. In other words, these were
 14 communications that the Bishops were duty bound to receive as LDS clergy in the "course of
 15 discipline enjoined" by the LDS Church. *Martin*, 975 P.2d at 787 ("Determination of the
 16 definition of 'confession' [under the statute] is to be made by the church of the clergy
 17 member," and "not the courts.").

18 **2. The Communications at Issue Are Confidential.**

19 Likewise, LDS Church doctrine and policy explicitly mandate that bishops keep
 20 confidential these private communications. Church Handbook at 93 (requiring "[b]ishops" to
 21 "keep confidential all information that members give them in confessions and interviews.")
 22 This duty of confidentiality is so significant that Church clergy are required to maintain this
 23 confidentiality both "[d]uring and after their term of service in a calling . . . [since] a breach of
 24 confidence can damage trust, testimonies, and faith." *Id.* at 22.

25
 26
 27 ⁶ The Church Policy itself makes clear that Bishop Borland and Bishop Coleman are
 required to keep these communications confidential. Church Handbook at p. 22.

1 Plaintiffs argue that the communications between Bishop Coleman and Jack LoHolt
 2 were not confidential because they occurred in the bishop's office. Motion to Compel at 11 n.
 3 26. The Bishop's office, however, is precisely where one would expect a confidential
 4 communication to occur. Plaintiffs also argue that Bishop Coleman told the victim's parents
 5 after speaking to Jack LoHolt. Motion to Compel at 11 n. 27. This is factually inaccurate.
 6 Bishop Coleman testified that he spoke to Jack LoHolt's parents, not the victim's parents,
 7 about the complaint about their son. This is consistent with Bishop Coleman's
 8 characterization of the complaint being received from a non-confidential source. In contrast,
 9 Bishop Coleman did not reveal the confidential communications from LoHolt, which is
 10 consistent with their being privileged.

11 Thus the communications that Bishop Borland and Bishop Coleman had with Jack
 12 LoHolt are privileged communications—they were made to clergy, they meet the definition of
 13 confession as explained in *State v. Martin*, and the bishop is required by Church doctrine and
 14 policy to keep the communications confidential.

15 **3. The Privilege as to the Communications at Issue Has Not Been Waived.**

16 Under Washington law, only the communicant can waive the privilege. *State v.*
 17 *Martin*, 137 Wn.2d at 789 (Wash. 1999) (stating that only the penitent can waive the
 18 privilege). To date, there has been no indication from Jack LoHolt that he waives the
 19 privilege as to confidential communications with either Bishop Borland or Bishop Coleman.

20 **4. Counsel for the Church Properly Cited the First Amendment as a Basis 21 for the Clergy Privilege.**

22 Plaintiffs correctly note that the Church cited to the First Amendment as a basis for the
 23 clergy privilege. But they fail to point out that this was not the only basis for the claims of
 24 privilege. Counsel for the Church consistently referred as well to Washington law and *State*
 25 *v. Martin*. There is no reason for the court to address here whether the First Amendment is
 26 an additional basis for the clergy privilege as Washington law alone provides an adequate
 27

basis for the Church's privilege claims. *Sissoko v. Rocha*, 412 F.3d 1021, 1032 (9th Cir. 2005) (holding the court "must avoid reaching constitutional questions where possible").

It is worth noting, however, that several courts, including the U.S. Supreme Court and Ninth Circuit, have cited to the First Amendment as a basis for the clergy privilege in dicta. See, e.g., *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Mockaitis v. Harclerod*, 104 F.3d 1522, 1532-33 (9th Cir. 1997). Thus Plaintiffs misstate the law when they contend that the First Amendment is not grounds for claiming the privilege.⁷

5.. Counsel for the Church Correctly Asserted the Clergy Privilege by Way of Objection During the Depositions.

Plaintiffs also assert that counsel for the Church inappropriately made speaking objections when asserting the clergy privilege. Plaintiffs fail to note that the Federal Rules of Civil Procedure specifically call for this. Fed R. Civ. P. 30(d)(1) provides that a witness may be instructed not to answer "when necessary to preserve a privilege" such as the clergy communicant privilege. Thus, the speaking objections made by counsel for the Church are authorized by the Federal Rules and necessary to ensure the privilege is not breached.

IV. CONCLUSION

Plaintiffs' Motion to Compel should be denied because the Church and its bishops appropriately invoked the clergy privilege.

Respectfully submitted this 9th day of January, 2006.

STAFFORD FREY COOPER

By: /s/ Marcus B. Nash via ECF
Thomas D. Frey, WSBA # 1908
Marcus B. Nash, WSBA # 14471

⁷ Plaintiffs also cite the Washington Supreme Court's holding in *State v. Motherwell*, 114 Wn.2d 353 (1990). There, the Court concluded that a child abuse reporting statute that at one time included clergy on the list of mandatory reporters served a compelling state interest and did not run afoul of the First Amendment. *Motherwell* clearly does not address the issue of whether the First Amendment is a basis for the clergy privilege.

CERTIFICATE OF SERVICE

I certify that on the date noted below I electronically filed Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel using the CM/ECF system which will send notification of such filing to the following persons:

Michael T. Pfau
Gordon Thomas Honeywell Malanca Peterson & Daheim
600 University Street, Suite 2100
Seattle, WA 98101-4185
Email: mpfau@gth-law.com
Attorneys for Plaintiffs

Timothy D. Kosnoff
Law Offices of Timothy D. Kosnoff
600 University Street, Suite 2100
Seattle, WA 98101
Email: timkosnoff@comcast.net
Attorneys for Plaintiffs

DATED this 9th day of January, 2006, at Seattle, Washington.

/s/ Marcus B. Nash via ECF